No. 12,844

IN THE

United States Court of Appeals

For the Ninth Circuit

GRAVELY MOTOR PLOW AND CULTIVATOR COMPANY (a corporation),
Appellant,

vs.

H. V. CARTER CO., INC. (a corporation),
Appellee.

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

APPELLEE'S BRIEF.

DAVID FREIDENRICH,
CARROLL, DAVIS & FREIDENRICH,
900 Balfour Building, San Francisco 4, California,
Attorneys for Appellee.

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The appellant's "Statement of the Case" is inaccurate, but appellee believes it will serve no useful purpose to restate it. The true facts of this case are disclosed in the Transcript of Record, and they speak for themselves. We do agree with appellant, however, that the two questions involved in this case are: (1) Was Gravely doing business within the State of California at the time process was served on Heinen; and (2) were the orders for the 122 tractors placed by Carter accepted by Gravely.

In its "Specifications of Errors" appellant finds fault with certain findings of the trial court. The first assignment of error deals with the action of the trial court and of Judge Harris in denying appellant's motion to quash service of summons on Gravely. This will be dealt with in our discussion under the heading of Jurisdiction. Appellant's second assignment of error concerns the court's finding "That plaintiff was not at any time a dealer or agent of 'Pacific.'" Insofar as appellant is concerned, this is an immaterial finding and does not possibly affect the judgment in this case. Appellant's next objection is that the lower court found that during all of the times the orders for 122 tractors were forwarded to Gravely, Carter was a non-exclusive dealer of Gravely products and continued as such dealer until August 23, 1946. No other finding is possible under the evidence submitted in this case, and appellant's conclusions as to why the finding is erroneous are wholly irrelevant.

Appellant next complains of the court's finding that plaintiff placed orders for 122 tractors with defendant Gravely between the beginning of World War II and August 23, 1946. It bases its objection upon the ground that Carter submitted to Pacific on July 3, 1946, its order for 45 tractors. This order, the record discloses, went both to Pacific and to Gravely, so that the finding is entirely correct. (R. 117.)

Appellant next takes exception to the court's finding "That the said orders for 122 tractors were accepted by 'Gravely' with the qualifications that de-

liveries would be made as soon as conditions created by the War would permit." There is ample evidence to support this finding, and we respectfully refer the court to the following pages of the transcript of record to sustain the same: Pages 101, 182, 210, 212, 224.

Appellant objects to the court's finding "That all of said orders for 122 tractors were for 'ultimate purchasers', persons who had agreed to purchase the tractors from the plaintiff." This finding is supported by the evidence. See R. 100, 101.

Appellant objects to the court's finding that more than 122 tractors were shipped to Pacific by Gravely in the years 1945, 1946 and 1947, because the court in such finding referred to Pacific as Gravely's "California distributor", whereas appellant points out that Pacific was the distributor for Gravely originally in five Western states and subsequently in four Western states. The fact remains, however, that Pacific was nonetheless Gravely's California distributor. The fact that it might have been distributor for Gravely products in Arizona or Nevada does not change the situation. Furthermore, Pacific's place of business was in California, and hence there is no error in the court's finding.

Appellant finally objects to the fact that the lower court "Failed and refused to find that 'Gravely' was at the time of the commencement of the action and the issuance of process therein and had been prior thereto, doing business within the State of California." Appellee agrees that there should have been

such a finding. However, it does not lie in the mouth of appellant to object thereto. Appellee, in the court below, duly filed its Notice of Motion to Amend the Findings of Fact by making an additional Finding of Fact pursuant to Rule 52(b) of the Federal Rules of Civil Procedure. The additional Finding of Fact requested, as disclosed in Vol. 1 of the Clerk's Certified Transcript of Record (R. 267, 270) provided:

> "That 'Gravely' was at the time of the commencement of this action and the issuance of process therein and had been prior thereto doing business within the State of California."

The printed record discloses, on page 83 thereof, an order of the trial court denying appellee's proposed additional finding. However, prior to the order of the trial court and upon the filing of appellee's proposed additional finding, appellant filed a motion in opposition to appellee's proposed additional finding (R. 269) and in said motion appellant stated: "A continued adherence to this decision prevents the court from making a finding on the jurisdictional issue. To rule otherwse would be patently illogical." Appellant now urges before this court that the trial court's failure to grant appellee's motion to amend its findings by adding the proposed additional finding submitted by appellee constitutes reversible error. We submit that appellant is estopped from objecting in this court to failure of the trial court to make such finding by reason of its own action before the trial court in objecting to the proposed finding.

ARGUMENT.

1. Service of process upon Heinen as the person designated by Pacific to accept service of process constituted service upon Pacific and service upon Gravely, since Pacific was Gravely's corporate agent in California and was the instrumentality through which Gravely was doing business in California at the time of said service.

2. During the years 1943 to 1946 Carter was a dealer on behalf of Gravely in Northern California and forwarded to Gravely during this period of time orders for 122 tractors. All of these orders were accepted by Gravely, but Gravely notwithstanding its acceptance, sought to avoid the filling of the orders by discharging Carter as its dealer on August 23, 1946.

3. The trial court correctly found that although Gravely had the right to terminate Carter's relationship to it as a dealer, it could not legally avoid its obligation to Carter, and thus awarded the resultant damages.

I. JURISDICTION OF GRAVELY WAS OBTAINED BY SERVICE OF PROCESS ON THE MANAGER OF ITS SUBSIDIARY AND AGENT, PACIFIC.

Heinen, it is admitted, was the manager of Pacific in California. He was also the person designated by Pacific as its agent for service of process. If we assume for the sake of clarifying the first point, that Pacific was the agent of Gravely in California, then

it is clear that the proper way to obtain jurisdiction over Gravely in California in an action commenced in California was to serve its corporate agent, Pacific. Service upon Pacific had to be made by serving Heinen, and hence service upon Heinen constituted service upon Pacific and upon Gravely. Appellant would have this court believe that "If, as Carter asserts, Gravely was doing business in California without having qualified to do so, then the applicable statute would be Section 6501 of the Corporations Code of the State of California." This is the section that provides for service upon the Secretary of State "If no person has been designated and if no one of the officers or agents of the corporation specified in Section 6500 can be found * * *". Section 6500 of the Corporations Code of the State of California provides:

> "Process directed to any foreign corporation may be served upon the corporation by delivering a copy to the person designated as its agent for service of process or authorized to receive service of process, or to the president or other head of the corporation, a vice-president, a secretary, an assistant secretary, *the general manager in this State,* or the cashier or assistant cashier of a bank." (Emphasis added.)

If we assume that Pacific is the corporate agent of Gravely in California and as such its general manager, then, of course, Pacific is the proper party to serve in order to obtain jurisdiction over Gravely. In order to avail one's self of Section 6501, an affidavit must be filed with the court setting forth that

no agent for the service of process specified in Section 6500 can be found after diligent search, and thereupon the court is required to make an order permitting service upon the Secretary of State. We submit that such an affidavit could not honestly be made by appellee in this case, since at the time of service in this case it was and still is appellee's honest belief that an agent specified in Section 6500 of the Corporations Code of the State of California could be found, namely, Gravely's general manager in California, Pacific, upon whom service could and should be made. Hence, Section 6501 is not and was not the proper section to follow insofar as service of process on Gravely's agent in California was concerned.

In *Milbank v. Standard Motor Construction Co.,* 132 Cal. App. 67, at page 70, the court states:

> "The defendant further maintains that the service of process was not made on a 'managing agent' or 'business agent'. In the construction of this phrase there has always been a pronounced conflict in the authorities both state and federal, but the meaning of the term in this state is no longer susceptible of subtle distinctions, if we are to follow the recent construction of the expression as used in said Section 411 of the Code of Civil Procedure in *Roehl v. The Texas Company,* 107 Cal. App. 691, 704 [291 Pac. 255, 260] as follows: 'We hold the true rule to be * * * that "every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made." * * * Whether in any given case the agent in question, is a

> "managing agent" within what we have decided the meaning of that expression to be, must depend on the particular facts involved. It is impracticable to lay down a more concrete test of general validity.' "

In *Socony-Vacuum Oil Co. v. Superior Court,* 35 Cal. App. (2d) 92, service of process was made upon an individual who held a power of attorney from petitioner, Socony-Vacuum Oil Co., a New York corporation. The court held the individual served in California

> "* * * was an agent of the petitioner corporation, managing and controlling generally whatever services any of the ships of the petitioner corporation might require in loading or reloading. He was a general manager in California as distinguished from one in charge of a branch or department in a particular district * * *."

In *The Thew Shovel Company v. Superior Court,* 35 Cal. App. (2d) 183, at page 192 the court states:

> "The purpose of Section 406a, Civil Code [predecessor of Corporations Code 6500], is fulfilled if one of sufficient dignity is served to reasonably assure notice to the corporation."

The cited cases demonstrate that in the construction of the California Code sections dealing with service of process upon a foreign corporation the California courts have adopted a somewhat liberal attitude, namely, that if the agent served is of sufficient stature to make it appear reasonable that his cor-

porate principal will be notified of the service, then such agent is the proper person for service, and such service is consequently good service on the principal.

That service upon a *corporate* agent by serving an officer or general manager of said agent is effective service upon the corporate agent's principal has long been accepted in the Federal courts. Thus, in *Clover Leaf Freight Lines v. Pacific Coast Wholesalers,* 166 Fed. (2d) 626 at page 631, we find the following language:

> "Ordinarily, service on a foreign corporation doing business in another state may be made by service on its agent in said state. Here the agent of the foreign corporation is a domestic corporation. The avoidance of the service by the foreign corporation may not be accomplished because the agent is a local corporation rather than an individual. If the service on the local corporation —the agent—is good as to said local corporation, it follows that it is good as to the principal, the foreign corporation. Here the service on the president of Transport Co. was service on said domestic corporation. It was therefore good as service on the foreign corporation."

To paraphrase, "The service on Heinen, the manager of Pacific, was service on said Pacific; it was therefore good as service on the foreign corporation, Gravely."

See also:

Littman v. Morris B. Sachs, 65 N.Y.S. (2d) 754;

The State ex rel. New York Oil Co. v. Superior Court, 143 Wash. 641, 265 P. 1030;
Industrial Research Corp. v. General Motors Corp., 29 F. (2d) 623;
Postal Teleg. Cable Co. v. Thornton, 153 Ky. 176, 154 S.W. 1100;
Cutler v. Cutler-Hammer Mfg. Co., 266 F. 388;
Majestic Co. v. Orpheum Circuit, Inc., 21 F. (2d) 720.

II. GRAVELY WAS DOING BUSINESS IN CALIFORNIA THROUGH ITS SUBSIDIARY AND AGENT, PACIFIC, AT THE TIME OF SERVICE OF PROCESS.

A reading of the record, we feel certain, will disclose how completely and to what extent Pacific acted as the agent and *alter ego* of its parent and principal, Gravely. At the outset we desire to state that the test of whether or not Gravely was doing business in California through its agent, Pacific, does not depend upon the subsidiary-parent relationship between the two corporations, but rather the *principal-agent* relationship. In this case we find both, and hence there is no escaping the conclusion that Gravely was doing business in California through its agent, Pacific. On pages 153, 154 of the record we find the following testimony of John Williams Heinen, manager of Pacific:

"Mr. Carroll: Q. You made the termination on Mr. Hall's authorization, did you not?

A. Through his original permission, naturally, instructions.

Q. And acting as his agent?

A. Acting as his agent.

* * * * * * *

Q. You serviced their accounts so far as labor goes?

A. Right.

Q. When the Gravely Company received inquiries, it sent them out here for you to service?

A. Right.

Q. Did you do that all over California or just Southern California?

A. Mostly in Southern California.

Q. And they sent you lists of prospects from the Gravely Motor Plow and Cultivator Company?

A. Right.

Q. And you investigated those prospects?

A. Right.

Q. And you reported back?

A. Right.

Q. As a matter of fact, you were required to file reports for the Gravely Motor Plow and Cultivator Company in regard to that list of prospects, were you not?

A. New accounts that were good, yes.

* * * * * * *

Q. But you have reported back, results of your interviews with prospects?

A. Yes.

Q. If any complaints or difficulties arise with the users of equipment of the Gravely Motor Plow and Cultivator Company in Southern California, do you take care of those?

A. Yes.

Q. That has been your practice since you have been appointed?
A. Yes."

In addition thereto, Gravely by its own admission characterized Pacific as a *branch office*. On page 89 of the record, appears a portion of an exhibit consisting of a Gravely bulletin sent to Carter on or about August 7, 1945. This bulletin refers to Pacific as a *branch* and gives the address of its *branch* in California. Unfortunately, all of the exhibits received in evidence at the time of the hearing on appellant's motion to quash, which bore materially on the question of whether or not Gravely was doing business in California, have been lost by the Clerk of the District Court and are not available to this court. However, a portion of one of these exhibits just referred to is in the record, but the remainder of the exhibit has never been found. Furthermore, one of appellant's own exhibits, to-wit Exhibit DD, consists of another Gravely bulletin received by Carter on June 10, 1945, wherein it is stated:

> "Sales division established. Twelve new convenient *branches* have been established at strategic points in the United States. The controlling stock is owned by this Company. The purpose of these is to help you and will not in any way interfere with the work of each agent. *It will bring the factory and its policies close to the agent.* Meetings will be planned at these new headquarters. New contracts will be furnished through these corporations outlining full territory and other general conditions. (R. 140.) (Emphasis added.)

Actually twenty subsidiary corporations were formed by Gravely similar to its subsidiary in California, Pacific.

On the general question of what constitutes doing business in a given jurisdiction by a foreign corporation, it has been said,

> "Myriads of opinions have been published upon the oft-debated issue of the validity of service of process upon corporations in varying factual settings. There would seem to be no benefit to be derived from a standard discussion of other cases merely to point out the circumstances either analogous to or distinguishable from those confronted in the case at bar. We would refer to an erudite opinion upon the general topic written by Judge (Now Mr. Justice) Rutledge, in *Frene v. Louisville Cement Co.,* 77 U.S. App., D.C. 129, 134 Fed. 2d, 511, 515, 146 A.L.R. 926, wherein he asserted that the fundamental principle underlying the 'doing business concept' seems to be the maintenance within the jurisdiction of a regular, continuous course of business activities, whether or not inclusive of the final stage of contracting; and that very little more than 'mere solicitation' is now required to effectuate the result that a foreign corporation is 'present' in a state for jurisdictional purposes."
>
> *Bach v. Friden Calculating Machine Co.,* 167 Fed. (2d) 679, 680.

In *Bomze v. Nardis Sportwear, Inc.,* 165 Fed. (2d) 233, Judge Learned Hand discusses the new test evolved by the United States Supreme Court on the question of what constitutes doing business in the

case of *International Shoe Co. v. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. This new test is what is known as that of "balancing convenience". Judge Hand states:

> "The Supreme Court there declared that the corporation's 'presence' was to be determined by balancing the opposed interests: the convenience of the obligee against the burden upon the corporation."

As a matter of fact, the general subject of what constitutes doing business in California has been gone into very thoroughly in a number of California cases, and we believe that local law is controlling on this issue, since this action was originally commenced in the California courts and removed to the Federal Court by appellant. In the case of *The Thew Shovel Company v. Superior Court,* supra, the court had before it a somewhat similar factual situation to the instant case so far as the use of distributors in California by a foreign corporation was concerned. In that case The Thew Shovel Company was represented in California by two distributors, the Rix Company, Inc., in Northern California, and the LeRoi-Rix Machinery Company, Inc., in Southern California. Each distributor was granted the exclusive right to sell or buy for sale certain products of the manufacturer in a defined area and the right to sell direct in certain instances. In connection with sales by the distributor the prices were fixed by the manufacturer. The distributor was required to make weekly written reports to the manufacturer of all prospects and of the status

of transactions. It is interesting to note that the agreement between the distributor and the manufacturer contained the following provision:

> "The reason for this ruling covering consignment machines and their sale is to avoid the possibility of being involved in intrastate business where there might be evidence that we were doing business within the state without having taken out a license to do so. Some states have very peculiar laws in this respect, and to protect ourselves on deferred payment sales, it is absolutely necessary that the above procedure be religiously followed when a machine is sold from a consignment depot."

The court, concluding from all the evidence that The Thew Shovel Company was doing business in California through its distributors, stated:

> "It appears that petitioner's desire not to be involved in intrastate business arose from its unwillingness to take out a license and to comply with the attending tax regulations. Whether it succeeded in legally attaining its object is not necessary to pass upon in this proceeding. Suffice to say that whether the business conducted was interstate or intrastate makes no difference if petitioner was 'doing business' in the State of California within the meaning of that term as used in Section 411, Code of Civil Procedure. * * *
>
> "From the foregoing we conclude that the trial court was justified in determining that petitioner was transacting business in a substantial way in this state during the period when, according to the complaint, the alleged cause of action arose,

and that the above activities constituted 'doing business' as that term is used in section 411, Code of Civil Procedure. (*Chas. Ehrlich & Co. v. J. Ellis Slater Co.,* 183 Cal. 709 (192 Pac. 526); *Davenport v. Superior Court,* 183 Cal. 506 (191 Pac. 911); *Winfield v. United Fruit Co.,* 135 Cal. App. (Supp.) 791 (24 Pac. (2d) 247); *Milbank v. Standard Motor Const. Co.,* supra; *Davis v. Motive Parts Corp.,* 16 Fed. (2d) 148; *Murphy v. Campbell Soup Co.,* 40 Fed. (2d) 671; *Knapp v. Bullock Tractor Co.,* supra; *Cheli v. Cudahy Bros. Co.,* 260 Mich. 496 (245 N.W. 503); *International Harvester Co. v. Kentucky,* supra; *Plibrico Jointless Firebrick Co. v. Waltham Bleachery & Dye Works,* 274 Mass. 281 (174 N.E. 487).)"

The *Thew Shovel Co.* case was approved most recently in the case of *Sales Affiliates, Inc., v. Superior Court,* 96 Cal. App. (2d) 134, 214 P. (2d) 541. In this latest case on the subject, the court states:

"Our decision as to whether petitioner was shown to have been doing business in California is simplified by the absence of conflict in the evidence as to the material facts. In the comparatively recent cases of *Thew Shovel Co. v. Superior Court,* 35 Cal. App. 2d, 183, 95 Pac. 2d 149, and *West Publishing Co. v. Superior Court,* 20 Cal. 2d 720, 128 Pac. 2d 777, there will be found a full discussion of the factors which determine whether a foreign corporation is doing business in this state, as well as a consideration of leading Federal and state cases. There is no need for us to indulge in repetitious analysis of the authorities. Every factual situation where the question arises calls for a comparison of the business ad-

> vantages derived from the methods employed by the corporation, with those it would enjoy if it conducted its business through its own offices or paid agents in the state. *If the representation which petitioner maintained in the state gave it in a practical sense and to a substantial degree the benefits and advantages it would have enjoyed by operating through its own office or paid sales force, it was clearly doing business in the state so as to be amenable to civil process.*" (Emphasis supplied.)

The italicized portion of the above-cited quotation is the determining factor in this as well as any other case involving the question of doing of business by a foreign corporation in California. A reading of the record in the case at bar demonstrates that Gravely enjoyed every benefit and advantage operating through its wholly owned subsidiary, Pacific, that it would have enjoyed if it had operated its own office with its own paid sales force in California. No other conclusion is possible from the facts disclosed by the record, nor is it necessary to cite and quote from a multitude of cases from many jurisdictions in order to nail down the point.

It will serve no useful purpose to comment in detail upon the cases found and relied upon in appellant's brief on the general subject of jurisdiction. We have no quarrel with the general principles of law enunciated in and by these cases. The difficulty is that in applying them to the instant case, or for that matter, to any other case, they do not constitute au-

thority, for the obvious reason that in this field of law, as has been stated in innumerable cases, each case must be decided on its own particular set of facts. A determination that a particular foreign corporation is doing business in a particular state is bottomed primarily on a factual determinaton of what its activities consist of in that state. It may operate in that state in a number of different ways. If, however, it operates through the use of a subsidiary corporation and if that corporation is in fact an agent for the parent or principal, depending upon the type of activity conducted by the subsidiary corporation, then the foreign corporation is held to be doing business.

In the case of *Cannon Manufacturing Co. v. Cudahy Packing Co.,* 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634, strongly relied upon by appellant, the court, after reviewing the activities of the corporate subsidiary sales agent on behalf of its parent, Cudahy Packing Co., concludes:

> "The Alabama corporation, which has an office in North Carolina, is the instrumentality employed to market Cudahy products within the state; *but it does not do so as defendant's agent.* It buys from the defendant and sells to dealers." (Emphasis supplied.)

While we admit that it is difficult under the facts of the case as disclosed in the opinion of the court to justify the court's conclusion, nevertheless there can be no quarrel with the *basis* of the court's conclusion. We assume that if the court had found otherwise, it would not have hesitated to hold that the parent cor-

poration was doing business in North Carolina by reason of the activities of its corporate subsidiary therein.

Appellant refers to a comment by *Ballantine* in his work on *Corporations,* Rev. Ed. 1946, at page 325, concerning the case of *Industrial Reserve Corporation v. General Motors Corporation,* 29 Fed. (2d) 623. In that case the court held that General Motors Corporation was doing business in Ohio through the use of its wholly owned subsidiary, Industrial Reserve Corporation. Apparently Mr. Ballantine, being concerned primarily with the preservation of the fiction of corporate entity and disagreeing with the conclusion reached by the court in that case, criticizes the opinion. It is interesting, however, to note a contrary view expressed in the relatively recent case of *Pergament v. Frazer,* 93 Fed. Supp. 9, wherein the court, on page 12, states:

> "There has been a change in the attitude of the courts towards this much debated and perplexing question that has been before our tribunals for years and there is a tendency now to cut through the maze of corporate appearances to arrive at the true status and relationship. The fiction of corporate entity is no longer controlling. It is possible and permissible for a corporation not to desire to do business in a certain state and to create a separate corporation for that purpose. But if the separate corporation is actually so attached to the parent that the parent is in fact doing business in this state then the court must not permit vociferous contrary claims of the par-

ent to prevail. In the modern development of our business and general economic life, with the great possibilities of almost complete annihilation of space and time, the courts do not and should not encourage the creation of corporate empires which have subsidiaries trading on the strength of the main organization's name, financial position or products, only to have those who deal with the main organization, through the subsidiaries, learn that when question of suit arises it is necessary for the offended party to travel across the continent at great expense and inconvenience in order to find a jurisdiction where his suit may be tried. If this were an ordinary creditor bringing a law suit against defendant 'Metals' one's thought would rebel at such a conclusion of law. That it is a stockholders' suit does not change the fundamental equities. The following cases are indicative of the liberal trend the new decisions are taking. *Industrial Research Corp. v. General Motors Corp.,* D.C. 1928, 29 F.2d 623; *Clover Leaf Fr. Lines v. Pacific Coast Wholeslrs. Ass'n,* supra; *Fish v. East,* 10 Cir., 1940, 114 F. 2d 177, and *Commerce Trust Co. v. Woodbury,* 8 Cir., 1935, 77 F. 2d 478."

Finally, we desire to comment briefly upon the case of *Krane v. Gravely Motor Plow and Cultivator Company,* 69 N.Y. Supp. (2d) 175. It is true that in that case the New York Supreme Court, Appellate Division, held that Gravely was not doing business in New York State through its wholly-owned subsidiary, Gravely-Eastern. The decision of the majority of the court, however, fails to discuss any facts

but simply concludes that Gravel was not doing business through its subsidiary. A dissenting opinion was filed which we desire to quote from, not because we rely upon it as authority, but simply to illustrate the manner in which courts arrive at contrary conclusions from the same set of facts.

> "D. Ray Hall, president and director of both defendant and its subsidiary, while acting in his capacity as defendant's president, has in writing referred to "our selling and service organization in the eastern area' and also our 'branch office in New York City'. Gravely-Eastern, the subsidiary served, is defendant's representative in that area. * * *
>
> This case is not within the rule that mere ownership without more does not bring a parent company into a state so as to render it amenable to process. The subsidiary in question is one of nineteen subsidiary corporations owned by the defendants. The facts sufficiently show that the subsidiary was the defendant's agent here and that the defendant, the parent company, was doing business here through its agent."

III. DURING THE YEARS 1943 TO 1946 CARTER WAS A DEALER ON BEHALF OF GRAVELY IN NORTHERN CALIFORNIA AND FORWARDED TO GRAVELY DURING THIS PERIOD OF TIME ORDERS FOR 122 TRACTORS. ALL OF THESE ORDERS WERE ACCEPTED BY GRAVELY, BUT GRAVELY NOTWITHSTANDING ITS ACCEPTANCE, SOUGHT TO AVOID THE FILLING OF THE ORDERS BY DISCHARGING CARTER AS ITS DEALER ON AUGUST 23, 1946.

It is admitted that Carter placed with Gravely orders for 122 tractors between the years 1943 and

1946. (R. 101.) Gravely admits that it received the orders. (R. 100, 101, 116, 117.) Early in the war years it urged Carter to take as many orders as possible and promised that such orders would be filled in the order in which they were received. Appellee's Exhibit No. 12 consists of a Gravely bulletin sent to Carter, dated January 1, 1943, which contained the following directions:

> "New orders: Take just as many orders as you can. Tell everyone the true facts on delivery. In other words, no promises whatever excepting that after the picture changes, naturally our backlog of orders will be filled in order.
>
> We don't want you to slacken your efforts to sell our equipment for agricultural work. Sell the customer on the merits of the Gravely and on the thought of getting the equipment when you are able to furnish it." (R. 176.)

In addition to urging Carter to take as many orders as it could, Gravely sent out form acknowledgments to Carter's customers upon receipt of orders. These form acknowledgments were introduced in evidence as Appellant's Exhibits HH and II and start out by stating:

> "In accepting your order we call your attention to the facts which we list as follows:
>
> "The order is placed with the understanding that we will fill it as quickly as possible. We cannot recognize promised or implied time of delivery."

and it concludes:

> "Indeed you have chosen wisely, and you will again be wise in waiting until you can get a Gravely, knowing full well that we will supply it just as soon as it is possible."

In addition thereto, Mr. D. Ray Hall, president of Gravely, was examined at the trial of this action concerning the matter of acceptance, as follows:

> "Mr. Carroll: Q. As a matter of fact, Mr. Hall, it is true, is it not, that you did accept all of these orders for delivery as soon as you were able to make them?
>
> A. That's right.
>
> Q. You told the customers that, and you told your dealers that, did you not?
>
> A. That's right, with the qualifications as pointed out in the rest of the letter." (R. 180 and 182.)

Code of Civil Procedure of California, Section 1962, subdivision 3, provides:

> "Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

Gravely, through its president, D. Ray Hall, admitted in answer to questions that no order submitted by Carter had ever been declined—that so far as he recollected he had never notified Carter that an order was not accepted. (R. 213.)

The cases cited by appellant dealing with acceptance are not concerned with the factual situation that is present in the instant case, nor are they concerned with the point of law that is determinative of the facts found here. All of the cases relied upon by appellant are cases involving a single transaction between independent business concerns having no prior relationship, agreement, arrangement, contract or undertaking between them. It is true enough that under the Law of Contracts there must be a clear offer and clear acceptance. In the present case appellant by its spoken and written words led appellee to believe that all of its orders placed with appellant in good faith would be filled in the order in which they were received, at such time as appellant was able to get back into peacetime production. In addition to taking orders for Gravely tractors, Carter performed other tasks for Gravely. It exhibited its machines at county and state fairs, advertised its products, serviced its machines, instructed ultimate purchasers in the use of the same, and generally looked out for and protected the interest of Gravely over the years. As the trial court aptly stated in its Decision, Findings of Fact, and Conclusions of law, dated March 10, 1950:

> "The orders for 122 tractors, the subject matter of this action, were the result of solicitation by the plaintiff with the knowledge, consent, and at the request of the defendant. Plaintiff at all times was ready, willing and able to pay the manufacturer's 'list price' of each of the tractors ordered at the

time or before delivery was to be made. If defendant decided to refuse these orders it was within its right in such refusal, but defendant must compensate plaintiff for services rendered, and an accurate and fair measure of that compensation is on the basis of the 'discount'. (*Taylor Manufacturing Co. v. Hatcher Manufacturing Co.,* 39 Fed. 440; *Gantner & Mattern Co. v. Hawkins,* 201 Pac. 2d 847, holding that 'A principal cannot deprive his agent of commissions on goods ordered through the agent by discharging him before the orders are filled.' "

In addition to these cases, the following cases establish that an agent is entitled to his commissions upon all orders submitted and accepted by his principal prior to his discharge.

See:

Zinn v. Ex-Cell-O Corp., 24 Cal. (2d) 290, and cases cited therein;

Taylor v. Enoch Morgan's Sons Co., 124 N.Y. 184, 26 N.E. 314;

White Company v. W. P. Farley & Company, 219 Ky. 66, 292 S.W. 472;

Erskine v. Chevrolet Motor Company, 185 N.C. 479, 117 S.E. 706;

Watson v. Oregon Moline Plow Co., 112 Ore. 414, 227 Pac. 278;

Stephany v. Hunt Bros., 217 Pac. 797;

Parke v. Frank, 75 Cal. 364.

In *Taylor Manufacturing Co. v. Hatcher,* supra, the court stated:

"The view of the Taylor Company that the clause in its contract which obliged it to furnish the engines Hatcher might require, if the exigencies of its business permitted, is important, is altogether erroneous. This clause must have a practical and equitable construction. It did not give it the power arbitrarily that the exigencies of the business would not permit the engines to be furnished. It must have a valid reason for such a conclusion, and its validity must be shown by evidence. The courts of equity would never, in the absence of express declarations, construe such a clause to mean that, notwithstanding the services and expenditures of the Hatcher Company, the Taylor Company could at pleasure refuse to do anything toward the performance of the obligations it had undertaken."

The general rule may be found in 3 C.J.S., Section 185b, under the following heading: "Principal's duty to fill agent's orders":

"Ordinarily in the absence of a provision to the contrary in the agency contract, under a selling agency, where the agent's compensation is to be from commissions on sales, the principal is bound to accept and fill all orders sent in by the agent which in the exercise of an honest business judgment he would accept if he were actuated only by genuine business motives, and a principal who arbitrarily refuses or fails to sell to a purchaser who fulfills the requirements of the contract of agency is liable to the agent in damages."

In *Gantner & Mattern Co. v. Hawkins,* supra, the court's opinion recites the following facts:

> "Hawkins continued in the employment of appellant until February of 1945. At that time Hawkins visited San Francisco, where appellant's principal place of business is located, and informed John O. Gantner, Jr., that he was resigning from appellant's employment to devote his entire time to the business of Koret of California and possibly to engage in the future in the retail business. Gantner informed Hawkins that he would not be paid commissions on any articles thereafter shipped into Hawkins' territory on orders already obtained by Hawkins. Hawkins then refused to resign and Gantner discharged him.

Thereafter the defendant Hawkins was sued by the plaintiff company for declaratory relief. In that suit the defendant filed a cross-complaint for the commissions due him on goods sold by him before his discharge. From a judgment awarding him commissions on his cross-complaint, plaintiff appealed. In affirming the judgment of the lower court, the appellate court stated:

> "The claim that as a part of the consideration for his commissions respondent was bound to continue his good will services is answered
>
> 1. by respondent's testimony that he offered to perform such services and his offer was refused;
>
> 2. by an adverse finding on conflicting evidence against the claim that the contract bound respondent to continue such services in order to earn his commissions on sales already made; and

3. by the fact that such a construction of a contract at will would be most unreasonable *since it would put it in appellant's power to deprive respondent of commissions at any time by discharging him after orders were obtained and before they were filled. It is the general rule that a principal cannot deprive his agent of commissions on goods ordered through him by discharging him before the orders are filled.* (*Zinn v. Ex-Cell-O Corp.,* 24 Cal. 2d 290, 296 [149 P. 2d 177])." (Italics supplied.)

CONCLUSION.

The Decision, Findings of Fact and Conclusions of Law of the trial court in this case are fully supported by the evidence and are correct, and the record discloses no reversible error. Accordingly, appellee respectfully prays that the judgment of the trial court be affirmed and that appellee recover its costs on appeal.

Dated, San Francisco, California,
June 25, 1951.

Respectfully submitted,
DAVID FREIDENRICH,
CARROLL, DAVIS & FREIDENRICH,
Attorneys for Appellee.